IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 82.

DENIS W. MULLAN, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from a final judgment of the Court of Claims entered February 18, 1907, decreeing that upon the facts found by the court after trial the claimant's petition be dismissed.

The Findings of Fact made by the Court of Claims show that the appellant, now a commander on the retired list of the Navy, was serving in the grade of commander as commandant at the Pensacola, Florida, Navy Yard from July 30, 1896, to March 7, 1897. During this period charges were preferred against him to the Navy Department, and the appellant, learning of these charges, requested the Department to convene a court of inquiry to investigate them. Accordingly, a court of inquiry was appointed, and, after taking the testimony of certain witnesses, submitted to the Department a report adverse to the appellant.

At the time this report was submitted the appellant was subject to examination for promotion to the grade of captain. The effect of the adverse finding of the court of inquiry is well stated in the language of the opinion (Record, page 15) that—

> "unless he could acquit himself of the charges preferred, he would shortly be liable under the provisions of the act of August 5, 1882, section 1447, Revised Statutes, providing for his promotion, to which he was at the time eligible, to be discharged from the service with not more than one year's pay."

On May 19, 1897, the appellant made written application (Record, page 9) to the Secretary of the Navy, requesting "that a court-martial be ordered to try such charges as may be formulated from the findings of the court of inquiry, so that an opportunity may be afforded to try and determine such issues of fact before a naval court having full judicial powers."

On May 25, 1897, the Secretary of the Navy informed the appellant (Record, page 10) that he would convene a court-martial at Washington for his trial upon such charges as the Department might designate, provided that the record of the prior court of inquiry be admitted as evidence, each party to have the privilege of introducing other evidence.

On June 2, 1897, the appellant advised the Secretary of the Navy (Record, page 10) that he would agree to the above proposition if it be understood that the privilege of introducing other evidence should include the right to recall any witnesses who had testified before the court of inquiry, and to take depositions upon written interrogatories.

On June 8, 1897, the Secretary refused to permit the recalling of any witnesses who had testified before the court of inquiry, or to permit depositions to be taken by written interrogatories, requesting appellant to give this letter his immediate attention, "as the Department has determined that there must be a speedy end to the matter" (Record, page 11).

On June 9, 1897, the appellant notified the Department that he acceded to the conditions recited in the above letter (Record, page 12).

In pursuance of this correspondence, a court-martial was ordered by the Secretary of the Navy to try the appellant upon the charges of "drunkenness" and "drunkenness on duty."

At the convening of this court-martial, before the introduction of evidence, the Judge-Advocate presented to the court the letters between the Secretary of the Navy and the appellant, described above, and set forth in full in the Findings of Fact, and the correspondence was spread upon the record of proceedings of the court (Record, page 12).

The evidence submitted to said court-martial consisted of the record of the court of inquiry and the testimony of one witness, whose evidence, which was in favor of the appellant, is set forth on page 12 of the Record.

Upon the evidence so submitted, the court-martial found the appellant guilty of both charges and sentenced him to be dismissed from the Navy. This sentence was approved by the Secretary of the Navy on June 30, 1897, and was submitted to the President, as required by law, who, on July 8, 1897, issued an order in the following language:

> "The sentence in the foregoing case of Commander Dennis W. Mullan, U. S. Navy, is confirmed, but is mitigated as follows: To be reduced in rank, so that his name shall be placed at the foot of the list of commanders in the Navy, and to be suspended from rank and duty, on one-half sea pay, for a period of five years, during which time he shall retain his place at the foot of said list."

The appellant, after the action of said court-martial, both before and after the approval of its findings by the President, protested against the illegality of these proceedings.

Under the above proceedings the appellant had, between July 8, 1897, and July 11, 1901, the sum of $3,934.14 deducted from the minimum pay of an officer of his grade.

The Court of Claims in its decision rendered February 18, 1907, held that the court-martial having been legally constituted, and having jurisdiction over both subject-matter and person, and no error being manifest in its proceedings or sentence, the petition should be dismissed.

The appellant, therefore, makes the following—

ASSIGNMENTS OF ERROR.

First. The court erred in not holding that the sentence predicated upon the findings of said court-martial was wholly void because the second charge upon which the appellant was tried was beyond the jurisdiction of the court-martial as constituted by the Secretary of the Navy. The maximum penalty attached to the first charge being the loss of ten numbers, the sentence must be sustained, if at all, upon the second charge.

Second. The court erred in not holding that if the acts of the convening authority are not to be construed as restricting the subject-matter of the court's jurisdiction to charges not "extending to dismissal," then the limitations imposed upon the power of the court by the convening authority in respect to the scope of its judicial inquiry are contrary to public policy, and a court-martial so restricted by the convening authority in the matter of its proceedings is not lawfully constituted, and has neither jurisdiction of the person of the defendant nor the subject-matter of the cause.

Third. The court erred in not holding that the sentence of said court was inoperative because it was not approved by the President, and that the order of the President issued July 8, 1897, was void because in violation of article 54 of section 1624 of the Revised Statutes of the United States.

ARGUMENT.

The several assignments of error will be considered in the order in which they are stated above.

FIRST ASSIGNMENT OF ERROR.

Charges Not within Jurisdiction of Court-Martial as Constituted by Secretary of the Navy.

This assignment is based upon the fact that the stipulation that the proceedings of a court of inquiry be admitted as evidence before a court-martial would only be valid in "cases not capital nor extending to the dismissal of a commissioned or warrant officer;" that at the time of the correspondence between the Secretary of the Navy and the appellant no charges had been formulated, and that to give the only possible legal intendment to the acts of the Secretary of the Navy as the convening authority of the court-martial, it must be presumed that the charges to be considered were impliedly restricted to those of lesser degree than those extending to dismissal.

The sentence could not be sustained upon the first charge, as the penalty for the offense of "drunkenness" is limited to loss of ten numbers.

The order convening the court was issued in connection with certain correspondence between the Secretary of the Navy and Commander Mullan which is quoted in the Findings of Fact. This correspondence was by the Judge-Advocate presented to the court before the trial of Commander Mullan commenced and was made a part of the record of the court. It was signed by the authority convening the court and is unquestionably to be considered as an act of the convening authority. As such it is a limitation upon the order convening the court.

The right of the convening authority to amend, modify or supplement the formal order convening the court at any time before or during the trial is well established (Winthrop's Military Law [1896], page 233).

An examination of this correspondence shows the following facts:

First. The accused requested trial upon any charges the Department might formulate upon the findings of the court of inquiry. This court had investigated and reported concerning a number of charges of more or less gravity, all of which were eliminated from the court-martial charges, except the two charges above referred to.

Second. The Department refused to order a court-martial.

Third. At the same time the Secretary offered to try him upon such portions of the findings of the court of inquiry as might be deemed proper to charge against him, provided that the record of the court of inquiry be accepted as evidence in the case, and the further condition later required that no witnesses there produced be again called for examination or cross-examination by either side.

Article 60 of section 1624 of the Revised Statutes of the United States, prescribing the rules for the government of the Navy, provides that proceedings of a court of inquiry may "in all cases not capital, *nor extending to the dismissal of a commissioned or warrant officer,*" be evidence before a court-martial if oral evidence cannot be obtained.

It would be competent for the Secretary of the Navy and the accused officer to stipulate before a trial that, in view of the difficulties preventing the production of oral testimony, the proceedings of a court of inquiry might be admitted in evidence. Such an agreement would be entirely lawful. It would be necessary in many cases to prevent a miscarriage of justice, for otherwise it would not be known, until the court-martial had passed upon the question of the possibility of producing oral testimony, whether the proceedings of the

court of inquiry would be admitted, and the party offering the evidence would be put to a considerable disadvantage.

Such an agreement is not expressly or impliedly forbidden by the statute. By the plain and mandatory provision of the statute, however, such evidence is not admissible in a case extending to the dismissal of a commissioned officer, whether oral evidence can or cannot be obtained.

The contention may be made by the appellee that the statute—Article 60 of R. S. 1624—did not prohibit the admission in evidence in Commander Mullan's case of the record of proceedings of the court of inquiry.

The section is as follows:

> "Article 60. The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the Judge-Advocate, and shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court-martial, provided oral testimony cannot be obtained."

It has been contended that this section making such proceedings admissible "in all cases not capital, *nor extending to the dismissal* of a commissioned or warrant officer," renders them inadmissible only in cases in which the sentence of dismissal is mandatory—that is, where there is no other punishment of less degree authorized.

We do not find that the courts have ever had occasioned to interpret this section. The fallacy of any such contention can be seen by an examination of the preceding articles of section 1624, which in great detail classify the various offenses and prescribe the punishment which a court-martial is authorized to impose.

In no case is the death penalty mandatory. Article 7, first enacted in the Act of July 17, 1862, the same act wherein Article 60 is found, provides that in any case in which a court-martial is authorized to adjudge the death penalty it may adjudge imprisonment at hard labor.

The only provision requiring sentence of dismissal upon conviction is that of Article 18, that officer employing his forces in returning fugitive from service or labor be dismissed. This was enacted March 13, 1862 (12 Stat., 354). Its object at that date was apparent, and the stringency of the penalty shows that Congress did not, in the Act of July 17, 1862, now Article 60, intend to make beneficent exception in favor of persons accused thereunder, which is denied to other persons accused of offenses of equal gravity.

On the other hand, there are numerous offenses which do not extend to dismissal. For nearly all of the offenses enumerated in the several articles, the punishment is "such punishment as a court-martial may adjudge." This is only restricted by Article 63, that where the punishment is left to the discretion of the court it "shall not, in time of peace, *be in excess of a limit* which the President may prescribe." That the statute was intended to refer to these cases, and to permit the use of such evidence is, we think, sufficiently clear.

Moreover, the use of the word "extending" in this section necessarily implies a possibility of a lesser sentence. In Wisconsin Central Railway Co. *vs.* Comstock, 71 Wisc., 88, the court held that the word "extended" implies something to be extended and is necessarily connected with that something. It is derived from "ex," meaning from or out of, and "tendere," to stretch or stretch out.

The case of Goulding *vs.* Hammond, 54 Fed. Rep., 639; 4 C. C. A., 533, also defines the meaning of the word in a connection having significant relative bearing upon the present case.

Another illustration of the use of this word is found in another part of R. S., 1624. Article 53 provides that "no sentence of a court-martial *extending to* the loss of life, or to the dismissal of a commissioned or warrant officer, shall be carried into execution until confirmed by the President."

This could not refer to cases wherein the sentence was mandatory upon the court; for, as above explained, no sentence of death is mandatory (Article 7).

Jurisdiction of Court as Constituted.

An agreement or order of the head of an executive department directly contravening the statute law is void for want of authority on the part of the government agent. It is also void as against public policy (Glavey *vs.* U. S., 182 U. S., 595). It is therefore not competent for the Secretary of the Navy to agree or order that the record of a court of inquiry should be admitted in a case where it is forbidden by the statute.

In this case the order convening the court and the conditions precedent to that order signed by the convening authority and made a part of its record are susceptible of two constructions. From a casual reading of the language employed it would appear that the word "charges" as used in that correspondence included all charges and would cover those upon which the claimant was tried. By one of the canons of construction, too familiar to the court to need supporting authorities, the agreement must be interpreted in such a manner as will give it a legal effect, if by any reasonable construction of the words that intention can be deduced. If the charges to be formulated contemplated by this correspondence were restricted to charges not extending to the dismissal of the claimant, the agreement would be in proper accord with the provisions of the statute. As the character of the charges was not discussed in the correspondence, but they were left open to be formulated thereafter and subsequent to the acceptance of the proposition by the claimant, it must be presumed that the charges contemplated were those which it would be lawful for the court to try in the manner prescribed.

If, therefore, the court, having before it as a part of its record the act of the convening authority, to be construed in connection with the order convening the court, should exceed the power conferred by the convening authority in considering charges beyond those to which its power of investigation are limited, its action in respect to those charges would be in excess of its jurisdiction over the subject-matter.

Under the law as it existed during the period covered by these proceedings, the limit of the punishment which the court could impose on the first charge was a loss of ten numbers. The limit of punishment on the second charge was dismissal (General Court-Martial Order No. 459 of March 25, 1896). The sentence of the court, as well as that substituted for it by the President, were both in excess of the limit fixed for the first charge and the sentence can only be sustained upon the second charge, which extended to dismissal.

The question may be raised as to whether a court-martial properly constituted for the trial of certain offenses has jurisdiction to render judgment on charges beyond those to which its power of investigation granted by the convening authority extends. Such a court is a court of limited jurisdiction. Its record must affirmatively show that it has jurisdiction over the person of the accused and over the subject-matter and that it has not, by the departure from the law, lost jurisdiction to render a valid judgment. If it has not jurisdiction of the person of the defendant, of the subject-matter, or to render the particular judgment assailed, its decision may be collaterally questioned (McClaughry *vs.* Deming, 186 U. S., 69).

As was said in the case of Runkel *vs.* U. S., 122 U. S., 543:

> "Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively.

> "As the sentence now under consideration involved the dismissal of Runkel from the Army, it could not become operative until approved by the President, after the whole proceedings of the court-martial had been laid before him."

Also in the case of McClaughry *vs.* Deming, *supra*, the court was declared to be "a special body convened for a specific purpose, and when that purpose is accomplished its duties are concluded and the court is dissolved." In the present case the court was convened for a specific purpose, as its record shows—the trial of Commander Mullan upon certain charges. The convening authority, in this case the Secretary of the Navy, fixed the powers of the court, the scope of its investigation, and the purpose for which it was created, as also appears from the record of the court. The subject-matter of the charges upon which the accused was tried and convicted was not within the authority granted and was such that the court could not, upon the evidence provided for by the convening authority and which was before it on the trial, render a valid judgment. As the Supreme Court said in the case of Runkel *vs.* U. S., referred to above, a court-martial is called into existence for a special purpose, to perform a particular duty. To give effect to its sentence it must affirmatively appear that the court was properly constituted; that it had jurisdiction of the person of the accused, of the subject-matter, and to render the particular judgment. Its authority is statutory and the statute under which it exists must be followed throughout.

SECOND ASSIGNMENT OF ERROR.

Illegality of Constitution of Court.

It is an essential characteristic of a judicial proceeding that the parties thereto have the right to submit such evidence as is by the common and statute law competent and admissible.

The converse is equally true—that the parties shall have the right to restrict their opponent's evidence to that which comes within the rules of admissibility defined by the statute or common law. When these rights are regulated or qualified by the parties themselves, the failure to object to evidence, or to produce other evidence, would be merely an irregularity of procedure; but when the court exists, as does a court-martial, by virtue of the order of one of the parties litigant, the waiver is all in favor of that party, exacted as a condition precedent to the order convening the court, and is by the Judge-Advocate, the representative of that party, made a part of the court's record before commencing the trial, the agreement becomes a limitation upon the authority granted in the order of the court, is its authority for receiving evidence contrary to statute, and had the claimant departed from the agreement in the trial of the case, the court would undoubtedly, acting on that authority, have denied his right. The Judge-Advocate so considered it. Otherwise there would have been no explanation for his having the correspondence set out in the findings made a part of the record of the court-martial.

With special strictness are and should these rules be enforced in favor of the accused in courts, either civil or military, in prosecutions for crimes.

If the objection now collaterally made related merely to the error of the court in admitting incompetent and inadmissible evidence, we are fully aware that this court could not consider it. The present case, however, is one wherein the error lies deeper. The accused goes into court with a waiver of this right forced from him. The court itself is created under statutory authority by the officer who has required him to waive these rights, and the agreement between the officer, upon whose order the court depends for its existence, and the accused, is made a part of the records of the court before the trial commences. It is thus incorporated in the proceedings and is in reality an amendment of and a

part of the order creating the court. If it be true that a portion of the order establishing a court-martial is void as against public policy and in violation of law, can that court, proceeding thereunder, exercise any function of a legally constituted court-martial?

The effect of an agreement made by the head of an executive department, whereby an employee for no additional consideration waived a statutory right, was considered by the Supreme Court in the case of Glavey *vs.* U. S., 182 U. S., 595, and held to be against public policy and void. Moreover, in the present case the rights waived by the claimant were not merely his statutory rights, but of such a character that he had no power to waive them, nor had the Secretary of the Navy the right to disregard them. The establishment and maintenance of the Navy is a matter or vital interest and consequence to the Government and to the whole people of the United States. The result of the action against Commander Mullan was possibly to force from the naval establishment, against his own volition, an officer whose tuition at the expense of the Government and long years of experience had made his services valuable.

Congress, by prescribing the manner of proceedings extending to dismissal of officers who can and are willing to render valuable service, has made a provision which protects not only the officer, but the people of the United States, and it is not competent for any one to waive that provision except the people of the United States speaking through their legislative body.

Judgment of a Court-Martial Improperly Convened is Subject to Collateral Attack.

Under no system of law—the existence of this court depending wholly upon the Constitution and statutes of Congress—there can be no such thing as a *de facto* court-martial (Hiekman *vs.* Jones, 76 U. S., 197; Hildreth *vs.* McIntire, 24

Ky. (1 J. J. Marsh), 206; Perkins *vs.* Corbin, 45 Ala., 103; 3 Am. Rep., 698; Tompkins *vs.* Makwin, 26 Ark., 586; 7 Am. Rep., 628; Snyder *vs.* Snyder, 3 W. Va., 200).

This point was directly determined in Deming *vs.* McClaughry, 186 U. S., 49, where the officers named in the order were not, under the statutes, eligible to try the accused. In that case it was further held that consent of the accused cannot confer jurisdiction where there is a defect in the organization of the court.

In that case the contention presented by the Government was in certain respects similar to the case at bar. The defense there made was that the statute disregarded in convening the court had reference to the procedure merely and did not extend to the jurisdiction of the court. That "it merely provides that certain officers shall not be competent to sit on such courts to try certain offenders, and that the jurisdiction of the court to hear and decide is regulated by other articles."

In answering this contention, Justice Peckham, delivering the opinion of the court, said:

> "But the court-martial that has jurisdiction over any offenses must, in the first place, be legally created and convened. Such a court is *not a continuous one, created by the statute itself* and filled from time to time by appointments of certain members under the power given by statute. The court has no continuous existence, but under the provisions of the statute it is called into being by the proper officer, who constitutes the court itself by the very act of appointing its members; and when in appointing such members he violates the statute, as in this case, by appointing men to compose the court that the statute says he shall not appoint, the body thus convened is not a legal court-martial, and has no jurisdiction over either the subject-matter of the charges against a volunteer officer or over the person of such an officer. The act of constituting the court is inseparable from the act which details the officers to constitute it. It is one act, and the court can have no existence outside of and separate

> from the officers detailed to compose it. By the violation of the law the body lacked any statutory authority for its existence, and it lacked, therefore, all jurisdiction over the defendant, or the subject-matter of the charges against him. It is said, in Keyes *vs.* United States, 109 U. S., 336, 27 L. Ed., 954, 3 Sup. Ct. Rep., 202, that where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment."

The defense may contend that the provision disregarded in Commander Mullan's trial was a mere statutory provision in his favor which, if waived, permitted the court to proceed. This contention must necessarily fail if it be true, as indicated above, that the provision protects not merely the officer but the State. The language of the section is that the proceedings of courts of inquiry "shall, in all cases not capital, *nor extending to the dismissal of a commissioned or warrant officer,* be evidenced before a court-martial, provided oral testimony cannot be obtained."

In the case of Glavey *vs.* United States, 182 U. S., 595, it was held that an agreement to waive part of a statutory salary, required of an officer, prior to appointing him to the office, was void on grounds of public policy. The court quoted from the decision of Judge Lacombe in Miller *vs.* United States, 103 F. R., 415, in part as follows:

> "Any bargain whereby in advance of his appointment to an office with a salary fixed by legislative authority, the appointee attempts to agree with the individual making the appointment that he will waive all salary or accept something less than the statutory sum, is contrary to public policy and should not be tolerated by the courts. * * * And if public policy prohibits such a bargain in advance, it would seem that a court should be astute not to give effect to such an illegal contract by indirection, as by spelling out a waiver or estoppel."

The Supreme Court (opinion by Justice Harlan) concurred in this view and suggested that if the right of the Executive be admitted to bargain away the provisions of statute relative to salary the subject would become transferred to the control of that branch of the Government. "Public policy," the courts say, "forbids the recognition of any such power as belonging to the head of an Executive Department."

There are instances, illustrated by the present case, where the interests of the accused officer call for the review of charges by court-martial. If the courts permit the officer authorized to convene the court to require waivers of statutory rights of the accused as conditions precedent to the ordering of the court, the subjects which Congress has seen fit to provide for by statute in respect to such courts are taken from the control of Congress and vested in the head of the department. And if the courts are to hold that the failure of the officer to object during the trial—when the agreement is held over him and he realizes that retraction on his part will undoubtedly result in the adjournment and dissolution of the court—is a waiver of his rights, then the evil will by indirection be permitted to exist. This same situation occurred in the Glavey case, wherein the court held that the waiver of his salary and the failure of the plaintiff to demand compensation until the termination of his employment did not defeat his suit.

The provision waived in this case—but which we maintain it was incompetent for the parties to waive—was a statutory provision made by Congress under its constitutional authority. It was a matter of substantial interest to the accused. The court was legally bound by the statute, notwithstanding this agreement, to enforce the law as Congress has made it. In the case of Dynes *vs.* Hoover, 201 How., 65, it was held:

> "The case in hand is not one of a court without jurisdiction over the subject-matter, or that of one

which has neglected the forms and rules of procedure enjoined for the exercise of jurisdiction. It was regularly convened; its forms of procedure were strictly observed, as they are directed to be by the statute; and if its sentence be a deviation from it, which we do not admit, it is not absolutely void."

* * * * * * *

"When confirmed it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the subject-matter or charge, *or one in which, having jurisdiction over the subject-matter, it has failed to observe the rules prescribed by the statute for its exercise.* In such cases, as has just been said, all of the parties to such illegal trial are trespassers upon a party aggrieved by it, and he may recover damages from them on a proper suit in a civil court, by the verdict of a jury.

"Persons, then, belonging to the Army and the Navy are not subject to illegal or irresponsible courts-martial, *when the law for convening them and directing their proceedings of organization and for trial have been disregarded.* In such cases, everything which may be done is void—not voidable, but void; and civil courts have never failed upon a proper suit to give a party redress, who has been injured by a void process or void judgment."

* * * * * * *

Courts-martial derive their jurisdiction and are regulated with us, by an Act of Congress, in which the crimes which may be committed, the manner of charging the accused, *and of trial,* and the punishments which may be inflicted, are either expressed in terms, or they may get jurisdiction by fair deduction from the definition or the crime that it comprehends."

THIRD ASSIGNMENT OF ERROR.

Illegality of President's Action.

The section of R. S. 1624 under which this contention is made is as follows:

> "Art. 54. Every officer who is authorized to convene a general court-martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm."

This section relates back to the provisions of Article 38—

> "General courts-martial may be convened by the President, the Secretary of the Navy, or the Commander-in-Chief of a fleet or squadrons."

Also to Article 53, providing that—

> "No sentence of a court-martial, extending to the loss of life, or to the dismissal of a commissioned or warrant officer, shall be carried into execution until confirmed by the President."

That such an approval by the President in a case where the sentence of dismissal is imposed, as was done in the case at bar, is essential to the validity of the sentence has been judicially determined. Runkel *vs.* United States, 122 U. S., 543. This case was cited with the following quotation, in the case of McClaughry *vs.* Deming, *supra:*

> "In order to give effect to the judgment of a court of that nature it must appear affirmatively that the court was legally constituted; that it had jurisdiction, and that all the statutory requirements governing that jurisdiction has been complied with, and that its sentence was conformable to law."

The question before the court in the Runkel case was stated by the court as follows:

> "As the sentence now under consideration involved the dismissal of Runkel from the Army, it could not become operative until approved by the President, after the whole proceedings of the court-martial had been laid before him. The important question is, therefore, whether that approval has been positively shown."

The President's confirmation of the sentence of a court-martial is therefore one of the "statutory regulations," the failure to execute which in conformity with law will render the judgment subject to collateral attack.

Upon this branch of the case the sole question before the court for determination is, we insist, whether the sentence imposed by the President on revision of the proceedings is in violation of Article 54 of section 1624, R. S. U. S. That article gives power "to remit or mitigate, *but not to commute*, the sentence."

The action of the President was not under his pardoning power, but in pursuance of his statutory duty to review all sentences of courts-martial extending to dismissal. (Article 53, *supra*.)

We quote the following order of the Navy Department construing Article 54:

GENERAL COURT-MARTIAL.

Order No. 89.

NAVY DEPARTMENT,
WASHINGTON, *October* 6, 1899.

George Van Orden, naval cadet, U. S. Navy, having been tried by general court-martial on board the U. S. S. *Helena*, and found guilty of "leaving his station before being regularly relieved," was sentenced "to be dismissed from the naval service of the United States."

The revising authority, "in consideration of the recommendation for clemency, signed by six of the seven members of the court, and in view of the fact that Naval Cadet George Van Orden was transferred to the United States Marine Corps as a first lieutenant, July 1st, 1899," mitigated the sentence "to a loss of fifteen numbers in that grade."

Article 54 of the articles governing the Navy confers upon every officer authorized to convene a general court-martial "power on revision of its proceedings to remit or mitigate, *but not to commute* the sentence of any such court which he is authorized to approve and confirm." The action of the revising authority in changing the punishment awarded by the court in the case of Van Orden from dismissal to loss of numbers, amounted to a commutation of the sentence (Winthrop's Military Law, edition of 1896, p. 722), which is expressly forbidden by the statutory provision just quoted. This being the case, the sentence has accordingly been set aside and the reviewing officer instructed to take such action as may be necessary in accordance with this decision of the Department.

CHAS. H. ALLEN,
Acting Secretary.

Section 112 of the Articles of War, *applicable only to the Army*, gives to the reviewing authority the power to pardon or mitigate, except in cases where the penalty of death or dismissal has been imposed. Concerning this section, Winthrop in his work on Military Law (1896) states:

"The 'power to pardon' given by this article being a power of remission only, and remission consisting simply in the doing away with a punishment, the exercise of the authority to commute would appear to be excluded from the contemplation of the statute. We have seen that commutation is distinct from mitigation. The conclusion would thus be that a military commander could not legally commute a punishment by the authority of this article. In this connection

> there may be some significance in the fact that the article expressly excepts from the application of the power conferred the punishments of death and *dismissal*, these being punishments *which can be abated by commutation only*" (page 723).

It will be noted that Commander Mullan's sentence not only suspended him but reduced his rank. Concerning reduction in rank or loss of numbers this same author states:

> "As remarked of suspension, it is sometimes resorted to by way of *commutation* for a more severe penalty, as dismissal" (page 631).

This is, of course, permissible under Article 112, relating to the Army, because of the exception of death and dismissal from the punishments which the reviewing authority cannot commute.

In a note—page 722—the same author states further that any contention that suspension is a mitigation of dismissal is erroneous:

> "Dismissal being an absolute and final separation of the person from the military office and from the Army—a status admitting of no degrees. Dismissal is therefore commuted, not mitigated, when suspension is substituted for it by the pardoning power."

Bouvier defines "mitigation" as "reduction; diminution; lessening of the amount of a penalty or punishment."

Commutation of a sentence is "a change of one punishment known to the law for another and different punishment also known to the law." "The substitution of a less for a greater punishment by authority of law" (*Ex parte* James, 1 Nev., 321; Lee *vs.* Murphy, 22 Grat., 728).

To commute is defined "to exchange for one penalty or

punishment another less severe" (Rich *vs.* Chamberlain, 107 Mich., 381).

See also:

Ex parte Parker, 106 Mo., 551.
Ex parte Collins, 94 Mo., 22.
State *vs.* State Board of Corrections, 16 Utah, 478.
Young *vs.* Young, 61 Tex., 191.
State *vs.* Peters, 43 Ohio St., 629.

"Commutation" is a term having a narrower and much more clearly defined signification than "mitigation." It is also a term which has received a repeated and uniform interpretation by the courts, so that no doubt of its peculiar significance can be entertained by the court.

The use of the term in so direct juxtaposition with the term "remit" and "mitigate" in the statute under construction shows that Congress had the distinction clearly in mind. Its purpose was to preserve in the Executive the pardoning power and to add to that power the right to diminish the amount of punishment by mitigation—in reality a remission of portion of the punishment made in advance of performance by the defendant and therefore a corollary of the pardoning power. But the statute also had in view the protection of the judicial power of the court-martial from encroachment on the part of the executive officers so constituted the reviewing authority, by the substitution of a punishment different from the character of that awarded by the court, and undoubtedly in some instances the imposition of a penalty which the court would not have imposed in the particular case.

The trouble and delay of re-referring the disapproved sentence to the court may be regarded by the department as a serious obstacle, but its duty is to execute the law as Congress has made it—not to substitute its own view of what sentence should have been imposed.

The action of the President clearly cannot be sustained as a conditional pardon under the pardoning power. Aside from the implied inhibition in Article 60, such a condition as was imposed in this case would be illegal.

A conditional pardon of this nature is a contract between the parties (People *vs.* Potter, 1 Edm. Sel. Cas. (N. Y.), 235; State *vs.* Smith, 1 Bailey L. (S. Car.), 286; 19 Am. Dec., 679; Lee *vs.* Murphy, 22 Grat. (Va.), 791; 12 Am. Rep., 563).

A contract between the Executive for the acceptance of a sum less than the statutory salary attached to his office is void and the officer may recover the full pay (Glavey *vs.* United States, 182 U. S., 595).

Respectfully submitted,

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